Supreme Court, U.S.
FILED

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

DWAYNE GRAY,

Respondent,

v.

CUYAHOGA COUNTY SHERIFF'S DEPARTMENT, et al.,

Defendants,

-and-

JAMES FUERST & RANDY USSERY,

Petitioners.

On Petition for Writ of Certiorari
To the Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether deputy sheriffs, employed at a county jail, are personally liable under 42 U.S.C. 1983 for a Fourteenth Amendment deprivation of "liberty without due process of law", if a person is detained pursuant to a valid out of state arrest warrant and they take affirmative actions to ascertain whether the person in custody is actually the person wanted by the out of state warrant.

2. Whether deputy sheriffs, employed at a county jail, are personally liable under 42 U.S.C. 1983 for a Fourteenth Amendment deprivation of "liberty without due process of law" when the person is held by a valid court order and the deputies do not possess authority to violate a court order by releasing the person detained.

3. Whether the deputy sheriff's actions are to be reviewed by a jury based upon a standard of "something akin to deliberate indifference" as set forth by the Sixth Circuit Court of Appeals.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioners, James Fuerst & Randy Ussery, respectfully pray that a Writ of Certiorari issue to review the Judgment of the Sixth Circuit Court of Appeals, which judgment became final on October 23, 1998, when the Sixth Circuit Court of Appeals denied the petition for rehearing en banc and issued an Order amending its opinion.

PARTIES

The Petitioners are James Fuerst and Randy Ussery, both of whom are employed with the Cuyahoga County, Ohio, Sheriff's Department. The Respondent is Dwayne Gray. All of the other defendants, including Dusan Jevitch and Cuyahoga County Sheriff's Department were dismissed.

OPINIONS BELOW

The judgment of the Sixth Circuit Court of Appeals appears at 160 F.3d 276 as modified by the October 23, 1998 Order. The original opinion appears at 150 F.3d 579. The Court of Appeals Opinions are attached in the Appendix as A1 and A3. The Opinion of the United States District Court for the Eastern District of Michigan is included in the appendix

at A11. The Report and Recommendation of the Magistrate Judge for the Eastern District of Michigan is attached at A14.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Order of the Sixth Circuit Court of Appeals denying the Petition for Rehearing en banc was issued on October 23, 1998. The jurisdiction of the Court is invoked under Title 28, U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals denied the request for rehearing en banc filed by James Fuerst and Randy Ussery by Order dated October 23, 1998. (Appendix A1). The Court of Appeals also amended its opinion altering the state of mind requirement from a "reasonableness" test to "something akin to deliberate indifference." (Appendix A2). The Sixth Circuit Court of Appeals issued its first decision on July 27,1998, which reversed the United States District Court's grant of summary judgment to all defendants in part and affirmed the decision, in part. (Appendix A3). The Appeals Court reversed the grant of summary judgment in favor of the two Sheriff's Deputies from Cuyahoga County, Ohio, James Fuerst and Randy Ussery, and affirmed the grant of summary judgment to the remaining Michigan official.

Previously, all of the other named defendants were dismissed. (Appendix A4, 150 F.3d at 580 n.1).

STATEMENT OF THE FACTS

Two Cuyahoga County, Ohio deputy sheriff's deputies face personal monetary liability under 42 U.S.C. 1983 based upon an inter-state warrant issued by the State of Michigan. Dwayne Gray was arrested in a suburb of Cleveland, Ohio and transported to the Cuyahoga County, Ohio jail. Gray appeared before the court where the Judge set his extradition hearing for 30 days hence. Ohio law provides that a Magistrate or Judge may "...commit him to the county jail for such a time, not to exceed thirty days and specified in the warrant, ... unless the accused furnishes bond or until he is legally discharged." R.C. 2963.13. On the day of the scheduled extradition hearing, Gray consented to extradition to Michigan.

During Gray's court ordered confinement, Gray claimed mistaken identity. The county officials did not ignore Gray's allegations. The deputies contacted Michigan and secured a picture of the man sought and known to Michigan officials as Dwayne Gray. The picture did not exactly match the person detained. The deputies inquired further. **Cuyahoga County officials requested fingerprint exemplars. The fingerprints exactly matched the person detained.** The two deputies were faced with contradictory information. Were the fingerprints or the picture correct? Did the person detained at the Cuyahoga County Jail alter his appearance,

but not his fingerprints? Further, Gray was incarcerated by a valid court order and deputy sheriffs could not, on their own volition, ignore a court order and release persons they may have believed were improperly held.

After Gray's extradition, Michigan officials determined that its records were incorrect and that Gray was not the person sought by Michigan. The evidence showed that Michigan's confusion resulted after an acquaintance of Gray had supplied Gray's name and other data to Michigan police officials during an arrest. When that acquaintance failed to complete the conditions of the probation, under the name of "Dwayne Gray," an arrest warrant was issued in Gray's name. As it was later discovered, Gray's acquaintances' actions, and the misinformation contained in Michigan's files caused the subsequent detainment of Gray.

The Constitutional provision at issue is the Fourteenth Amendment's prohibition of detention of "liberty, without due process of law." (Appendix A2, 160 F.3d at 276). Gray was afforded all procedural due process afforded by Ohio law. Gray was afforded an appearance before a Judge on October 20, 1993. Further, Gray was represented by counsel for an extradition hearing. On November 22, 1993, Gray consented to extradition and returned to Michigan. The facts show that all statutory provisions of the Ohio Revised Code were followed.

The Sixth Circuit Court of Appeals has remanded this case to permit a jury to determine if either of the deputy sheriffs "acted with something akin to deliberate indifference in failing to ascertain that the Dwayne Gray they had in custody was not the person wanted by the Michigan authorities on the outstanding parole-violation warrant." (Appendix A2).

The district court had granted summary judgment on Gray's Section 1983 claim to the Cuyahoga County officials as they received contradictory information and **requested additional information [the fingerprints] after receipt of the picture.** The Sixth Circuit reversed finding as to the Cuyahoga County officials and affirmed the dismissal as to the sole remaining Michigan official [Dusan Jevitch] as there was no evidence that he received the photograph.

ARGUMENTS RELIED ON FOR THE ALLOWANCE OF WRIT

ARGUMENT NO. 1

THE SIXTH CIRCUIT'S DECISION IS AN UNWARRANTED EXPANSION OF THE UNITED STATES SUPREME COURT'S DECISION IN *BAKER v. McCOLLAN*

The Sixth Circuit's decision is an unwarranted expansion of *Baker v. McCollan*, 443 U.S. 137 (1979). *Baker* involved the detention of a misidentified suspect and held the detention, even though mistaken, did not rise to a violation of the Fourth or Fourteenth Amendments to the United States Constitution.

Baker considered the duties of jailers and stated:

> The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished "without due process of law." A reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers--all of whom may be potential defendants in a §1983 action--is entirely consistent with "due process of law." Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. *Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim. The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury.*

Baker, 443 U.S. at 145-146 (emphasis added).

This court has acknowledged that persons may provide police incorrect information and conceal themselves to avoid arrest. *Hill v. California*, 401 U.S. 797, 803 (1971). Further, the mere fact that an innocent person was arrested or detained does not equate to a constitutional violation. *Dowling v. City of Philadelphia*, 855 F.2d 136, 141 (3rd Cir. 1988).

The deputies, through no fault of their own, were provided contradictory information by Michigan officials. The facts do not establish liability as *Baker* held that jail officials were not required to conduct an investigation into every claim of innocence and, if an investigation was conducted, the Constitution does not require an error free investigation. The facts show that the deputies did not ignore Gray's plea that he was the wrong person. The deputies requested information from the Michigan officials and a picture was received which did not match the person detained. The deputies requested additional information which was fingerprints. The fingerprints were an exact match!

The Sixth Circuit's decision establishes potential liability even when jail officials attempt to investigate the claims of mistaken identity. Such a result cannot be reconciled with the *Baker* decision. Courts have not created duties upon law enforcement officials to investigate claims of

innocence or such matters such as a potential statute of limitations defense. *Thompson v. Duke*, 882 F.2d 1180, 1186 (7th Cir. 1989) (county jail officials have no duty to investigate claims of innocence); Dickens *v. Hollowell*, 59 F.3d 1203, 1207 (11th Cir. 1995) (no duty to investigate the statute of limitations defense); *Moore v. Tartler*, 986 F.2d 682, 687 (3rd Cir. 1993) (parole board not violate constitutional rights when substantial delay occurs in investigation of inmate's claims).

The Court used the following language contained in *Baker* to support their decision.

> Respondent was indeed deprived of his liberty for a period of days, but it was pursuant to a warrant conforming, for purposes of our decision, to the requirements of the Fourth Amendment. Obviously, one in respondent's position could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment.

(Appendix A8, citing *Baker*, 443 U.S. at 144).

The Sixth Circuit panel court focused on the 41 days from date of detainment until the matter was rectified by Michigan officials after Gray consented to extradition. The Appeals Court held that, as a matter of law, the 41 day period of incarceration is an "indefinite" time period contemplated by *Baker* and violative of constitutional rights. (Appendix A8).

The appellate court's focus on the number of days of detention misinterprets the *Baker* decision. While the *Baker* decision left open the possibility that an indefinite detention could, in some cases, rise to the level of constitutional concern, the mere length of detention is not dispositive of whether a constitutional violation has occurred.

In support of its decision the Sixth Circuit cited two district court decisions, *Rodriguez v. Roth*, 516 F.Supp. 410 (E.D.Pa. 1981) and *Andujar v. City of Boston*, 760 F.Supp. 238 (D. Mass. 1991). Both cases considered the length of incarceration as well as other factors, such as the ability to detect the error in identification [*Rodriguez*, 516 F.Supp. at 412] or that the jailer failed to even obtain photographic booking information [*Andujar*, 760 F.Supp. at 240].

The Sixth Circuit, based upon the length of detention and the photograph found that a jury question existed as to the reasonableness of the jail official's acts or omissions. The County officials performed a proper investigation into the Gray's claim of misidentification including checking fingerprints. That Michigan's records were incorrect because of a person duping Michigan police officers by providing false identification does not create liability against Cuyahoga County, Ohio officials. These facts do not create liability upon Cuyahoga County Ohio officials who merely work at the jail.

ARGUMENT NO. 2

THE TWO DEPUTIES WERE NOT RESPONSIBLE FOR PROVIDING DUE PROCESS TO GRAY AND GRAY WAS AFFORDED ALL THE PROCESS THAT WAS DUE AS HE WAS PROVIDED, AND WAIVED, AN EXTRADITION HEARING

The deputies were not required to provide due process to Gray as they are merely employed by the jail. However, the facts proved that Gray was provided all the process that was due.

PROCEDURAL DUE PROCESS CLAIM

Ohio law provides for procedural hearings which comport with notions of due process. Ohio law provides a hearing at a reasonable time and place and Gray availed himself to the hearing. Gray was represented by legal counsel for the extradition hearing. However, Gray waived his extradition hearing and returned to Michigan.

Ohio Revised Code Section 2963.13 governs the extradition of fugitives wanted in another state is, and states:

> If from examination before the judge or magistrate it appears that the person held under Section 2963.11 or 23963.12 of the Revised Code is the person charged with having committed the crime alleged and that he has fled from justice, the *judge or magistrate must, by warrant reciting the accusation, commit him to the county jail for such a time, not to exceed thirty days and specified in the warrant, as*

> *will enable the arrest of the accused to be made under a warrant of the governor or a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused furnishes bail or until he is legally discharged.*

(Emphasis added).

Under Ohio law governing the extradition of fugitives, the Court of Common Pleas sets the extradition hearing date. Defendants, Sheriff's Deputies Fuerst and Ussery, exercised no control over the court of common pleas procedure and therefore, had no constitutional obligations for provision of procedural due process at this stage of the proceedings.

The procedural due process claim also fails under *Parratt v. Taylor*, 451 U.S. 527 (1981). *Parratt* applies to allegations of deprivation of liberty. *Zinermon v. Burch*, 494 U.S. 113 (1990); *Wilson v. Beebe*, 770 F.2d 578 (6th Cir. 1985) (en banc). Gray could not, and did not, prove that the state law procedures were inadequate. *Vicory v. Walton*, 721 F.2d 1062, 1066 (6th Cir. 1983), *cert. denied*, 469 U.S. 834 (1984). Gray was provided due process and eventually waived objections to extradition. Therefore, summary judgment was properly granted to the two Sheriff's deputies on Gray's procedural due process claim by the District Court.

SUBSTANTIVE DUE PROCESS CLAIM

The Appeals Court did not distinguish as to the procedural or substantive aspect of the Due Process claim. The Supreme Court has cautioned against expansion of the substantive due process concept "because guideposts for responsible decision making in this unchartered area are scarce and open ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Substantive Due Process acts as a "check on official misconduct which infringes on a fundamental right or as a limitation on official misconduct" which shocks the conscience. *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996).

In the case at bar, the substantive due process claim does not rise to a constitutional level or "shock the conscience" when the governmental officials were faced with a decision on which information to rely upon. The Two County officials had an exact match of fingerprints showing that the man in custody was the person wanted by Michigan authorities. See, *Braley v. City of Pontiac*, 906 F.2d 220, 225-26 (6th Cir. 1990) (claim of false arrest, false imprisonment and malicious prosecution did not "shock the conscience" and not state substantive due process claim). Choosing to

rely on certain evidence and discounting other evidence may, at most, be negligence. Negligence does not state a claim for violation of the Due Process Clause. *Daniels v. Williams*, 474 U.S. 327 (1986).

ARGUMENT NO. 3

THE DELIBERATE INDIFFERENCE STANDARD, AND NOT "SOMETHING AKIN TO DELIBERATE INDIFFERENCE" STANDARD IS APPLICABLE TO A FOURTEENTH AMENDMENT CLAIM OF DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS

The Court's original opinion applied a "reasonableness" standard. (Appendix A8-A9). The Court modified its opinion to require a state of mind requirement as "something akin to deliberate indifference." (Appendix A2).

Other courts considering this issue have used a "deliberate indifference" or "reckless intent to falsely imprison" standard when considering this type of Fourteenth Amendment claim. *Romero v. Fay*, 45 F.3d 1472, 1480 (10th Cir. 1995); *Cannon v. Macon County*, 1 F.3d 1558, 1564 (11th Cir. 1993) (deliberate indifference); *Sanders v. English*, 950 F.2d 1152, 1160-62 (5th Cir. 1992) (requiring defendant to willfully ignore substantial exculpatory evidence); *Sample v. Diecks*, 885 F.2d 1099, 1110 (3rd Cir. 1989); *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

The Sixth Circuit's creation of a new standard of review was improper and should be considered by this Court. The newly created standard of review makes the charging of a jury difficult, and creates conflicts with other circuits.

CONCLUSION

The reasons argued above make the case for the grant of Certiorari in the cause.

Respectfully requested,

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APPENDIX

Dwayne Gray, Plaintiff-Appellant,

v.

Cuyahoga County Sheriff's Department, et al.,

James Fuerst, et al., Defendants-Appellees.

No. 97-1379.

United States Court of Appeals,
Sixth Circuit.

Oct. 23, 1998.

Before: NELSON, BOGGS, and CLAY,
Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

However, the panel has amended one portion of the opinion. In the paragraph beginning on page 8 and carrying over to page 9 of the opinion, the material following the long dash in line 16 should
be deleted and the following text inserted:

"...the trier of fact could find that the failure by Fuerst and Ussery to ascertain that they were holding the wrong person violated Gray's due-

process rights under the Fourteenth Amendment. While the cases discussed in the two previous paragraphs at times speak in terms of a variety of constitutional provisions, it appears to us more precise to follow the language of the Supreme Court in *Baker* and inquire whether a detention of this length will deprive the accused of "liberty without due process of law." *Baker [v. McCollan]*, 443 U.S. [137], 145[, 99 S. Ct. 2689, 61 L.Ed.2d 433 (1979)]. On remand, therefore, the principal question for the trier of fact will be whether Fuerst and/or Ussery acted with something akin to deliberate indifference in failing to ascertain that the Dwayne Gray they had in custody was not the person wanted by the Michigan authorities on the outstanding parole-violation warrant. See, *e.g.*, *Romero v. Fay*, 45 F.3d 1472, 1480-81 (10th Cir. 1995); *Cannon v. Macon County*, 1 F.3d 1558, 1564 (11th Cir. 1993); *Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir. 1992). This question will require resolution whether the defendants proceed on the merits, or whether they reassert the defense of qualified immunity. See *Jackson v. Hoylman*, 933 F.2d 401, 403 (6th Cir. 1991)(recognizing that same substantive standard applies for both qualified-immunity and merits purposes.)"

Dwayne Gray, Plaintiff-Appellant,

v.

Cuyahoga County Sheriff's Department, et al.,

Defendants,

James Fuerst, Randy Ussery, and Dusan Jevitch, Defendants-Appellees.

No. 97-1379

United States Court of Appeals,
Sixth Circuit.

Argued May 1, 1998.

Decided July 27, 1998.

Thomas H. Bannigan (argued and briefed), Christensen & Bannigan, Detroit, Michigan, for Gray.

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Jeffrey I. Sherwin, Office of the Prosecuting Attorney (argued and briefed), Justice Center, Cleveland, Ohio, for Ussery.

Before: NELSON, BOGGS, and CLAY. Circuit Judges.

BOGGS, Circuit Judge.

OPINION

Plaintiff Dwayne Gray appeals from an order of the district court granting a defense motion for summary judgment on his Fourth Amendment and due-process claims against defendants, James Fuerst,

Randy Ussery, and Dusan Jevitch.[1] Fuerst and Ussery are Cuyahoga County sheriff's deputies; Jevitch is an employee in the Identification Section of the Michigan State Police. Because the facts alleged, taken in the light most favorable to Gray, could support a jury verdict in his favor on his claims against Fuerst and Ussery, we now reverse in part and affirm in part.

I

Gray, a resident of Michigan, was stopped by police officers in suburban Cleveland on September 24, 1993, and ticketed for driving without a license. After being released on his own recognizance, Gray appeared in court on October 19, 1993, and was sentenced to five days in jail for his traffic offense. When officers booked him at the North Royalton Jail, they discovered that the Michigan Department of Corrections ("MDOC") had an outstanding parole-violator warrant for a person named "Dwayne Gray," and that the MDOC requested extradition.

The next day, Cuyahoga County officials informed a judge of the municipal court that Gray was wanted in Michigan and that the MDOC had requested extradition. The judge then suspended the balance of Gray's five-day sentence and ordered him taken to the that his "brother Anthony uses his [identification] information." Having been informed of Gray's arrest, the MDOC Cuyahoga County Jail, where the Cuyahoga County Sheriff's Department was to handle extradition proceedings. Gray immediately protested that he was not the person wanted by the MDOC, and he told the booking officers mailed Fuerst copies of the warrant and the "Basic Information Sheet" pertaining to the "Dwayne Gray" wanted in Michigan. The Basic Information Sheet included the wanted man's name; birth date; FBI, State identification and Social Security numbers; information concerning his race, sex, height, weight, and other physical characteristics; and a photograph. Most of the information provided by the MDOC matched Gray exactly; however, the photograph looked nothing like him, and the physical description provided by the MDOC referred to certain scars that Gray did not have.

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[1] Gray originally sued 12 defendants, including municipal entities and officials of Michigan and Ohio police and penal agencies. Prior to the summary judgment stage, Gray voluntarily dismissed all defendants other than Fuerst, Ussery, and Jevtich. The district court's summary judgment order, and this appeal, therefore relate only to these three defendants.

Gray continued to protest that he was innocent and that his was a case of mistaken identity. Therefore, on October 26, 1993 - six days after he was booked at the Cuyahoga County Jail on suspicion of being the man wanted by the MDOC - Ussery contacted the Michigan State Police to obtain a copy of the fingerprints of the person identified in the MDOC's warrant and Basic Information Sheet. Jevitch processed this request, found a file jacket with information matching the MDOC information forwarded by Ussery, and sent Ussery by fax a copy of the fingerprint card contained in the file jacket. Jevitch also mailed a hard copy of the fingerprint card. Those fingerprints on the card matched those of Gray.

Meanwhile, counsel was appointed to represent Gray in the upcoming extradition proceedings. Gray continued to protest that he was not the person wanted by the MDOC. After the fingerprints sent by Jevitch to Ussery were found to match his own fingerprints, however, Gray was advised that it likely would be easier to clear up the problem if he went back to Michigan. Gray took this advice and waived extradition proceedings on November 22, 1993 - more than a month after he was first incarcerated.

Gray arrived at the State Prison of Southern Michigan on Wednesday, November 24, 1993, the day before Thanksgiving. The administrative offices of the prison were closed over the holiday weekend. On Monday, November 29, 1993, when the offices reopened, Gray's fingerprints were found not to match the fingerprints of the wanted parole violator that were on file at the prison. Gray was released the same day.

As the magistrate judge found in the proceedings below, one basis of Gray's unfortunate mix-up was Gray's 1987 arrest by Detroit police officers for receiving stolen property. Although Gray was sentenced only to probation and served no jail time, his fingerprints were taken and sent to a Central State Police file in Lansing. Gray also was assigned a State identification number, and a file with Gray's identifying information was opened. Gray was discharged from probation in February 1989. In October 1989, an old acquaintance of Gray named Earl Shaw was arrested in Muskegon, Michigan, on drug charges. Shaw, who also was a friend of Gray's brother, duped his arresting officers into believing that he was Gray; he used Gray's identifying information, and was convicted, sentenced, and incarcerated under the name of Dwayne Gray. After serving time in the custody of the MDOC, Shaw-whom the MDOC believed to be

Gray-was paroled in February 1992. When he failed to report to a parole officer as directed, a warrant for his arrest was issued in October 1992. Because of Shaw's scam, the MDOC issued the warrant in the name of Dwayne Gray.

This warrant, intended for Shaw but issued in Gray's name, was the basis of Gray's incarceration in the Cuyahoga County Jail on October 20, 1993. The reason that all of the data contained on the Basic Information Sheet matched Gray was that Shaw purposely deceived the officers in Michigan into believing he was Gray. It thus follows that, when Fuerst and Ussery requested information on the Dwayne Gray wanted by the MDOC, and provided identifying information for the real Gray, Jevitch provided fingerprints from the real Gray's police file. Jevitch, who was merely an officer worker and had never seen Gray, had no way of knowing that the individual whose identifying information was provided by Fuerst and Ussery was not in fact Gray. Fuerst and Ussery, on the other hand, had more than just the cold data they provided to Jevitch: they had a mug shot and a physical description, neither of which matched the man they had in custody.

II

Gray filed two separate complaints in this matter. On February 3, 1995, he filed suit against various defendants affiliated with Cuyahoga County, Ohio: Garfield Heights, Ohio (where he was stopped on the original traffic violation); and the Southern Michigan State Prison. On October 12, 1995, Gray filed suit against Fuerst, Ussery, Jevitch, and various other Michigan State officials. Gray later voluntarily dismissed his claims against all defendants other than Fuerst, Ussery, and Jevitch. The essence of his claims against these three defendants is that there was a vast discrepancy between, on the one hand, the photograph and physical description of the "Dwayne Gray" wanted by the MDOC, and on the other, the appearance of the real Gray: because of this difference, the defendants knew or should have been able to ascertain that they had the wrong man. According to Gray, the defendants' failure to discover that he was not the man wanted by the MDOC, and his resulting wrongful imprisonment for more than a month, violated his rights under federal and state law.

A magistrate judge recommended that the defendants' motions for summary judgment be granted, and that Gray's complaints be dismissed. Gray filed objections to the magistrate judge's report and recommendation, focusing exclusively on his federal constitutional claims.

The district court adopted the magistrate judges recommendation and dismissed Gray's complaints. The sole issue on appeal is whether Gray's 41-day imprisonment, from October 20 through November 29, 1993, could have violated his constitutional rights, given that his jailers had in their possession a photograph and a physical description that did not match Gray's appearance.

III

A

[1] The question presented by this case is whether someone who is wrongfully imprisoned as a result of mistaken identity can state a constitutional claim against his jailers based on their failure to ascertain that they had the wrong man. The leading case on this issue is *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). In *Baker*, the Supreme Court held that where a plaintiff was arrested pursuant to a facially valid warrant, and where the plaintiff was detained for three days over the New Year's holiday despite his protestations of mistaken identity, the plaintiff's wrongful imprisonment did not give rise to a claim that the Fourth Amendment's prohibition against unreasonable seizures had been violated. The Court stated that "[w]hatever claims this situation might give rise to under state tort law, we think it gives rise to no claim under the United States Constitution." *Id.* at 144. 99 S.Ct. 2689. However, the Court went on to acknowledge that "[o]bviously, one in [the plaintiff's] position could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment." *Ibid.* Perhaps envisioning a case such as Gray's, the Court then stated that "[w]e may even assume, *arguendo*, that, depending on what procedures the state affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of "liberty without due process of law." *Id.* at 145, 99 S.Ct. 2689.

Courts have had few opportunities to consider how long a period of wrongful incarceration must be before constitutional concerns are implicated. At least two courts, however, have found periods of incarceration based on mistaken identity to be long enough to state a constitutional claim under *Baker*. In *Rodriguez v. Roth*, 516 F.Supp. 410

(E.D. Pa. 1981), the defendant prison officials held the plaintiff in a county jail for 30 days on a facially valid warrant before discovering that they had the wrong man. In light of *Baker*, Judge Pollak ruled that the significantly longer period of incarceration (30 days versus three), coupled with the fact that the defendants apparently had the ability to discovery the error in identification, was sufficient to permit the plaintiff to take his case to a jury based on claims asserted under the Fourth, Fifth, and Sixth Amendments. *See id.* at 412. Similarly, in *Andujar v. City of Boston*, 760 F.Supp. 238 (D.Mass. 1991), the plaintiff was kept in jail for 12 days despite repeated assertions of mistaken identity. The Court discussed *Baker* and concluded that "plaintiff's allegation of an unlawful arrest and twelve-day imprisonment is certainly enough to state a claim for a deprivation of liberty without due process of law." *Id.* at 241. In particular, the court focused on the defendants' failure to "obtain photographic booking evidence" that they had the right man. *See id.* at 240.

[2] We find these cases persuasive. Here, Gray was imprisoned for 41 days. It is conceded that he is not the person named in the warrant pursuant to which he was incarcerated.[2] There is no dispute that Fuerst and Ussery were in possession of a photograph that bore virtually no resemblance to Gray, as well as a physical description detailing certain permanent scars that Gray did not have.[3] The photograph, in fact, was mailed to Fuerst on the first day of Gray's lengthy incarceration. Absent sufficient proof to the contrary-for instance, proof that Fuerst and Ussery never received the photograph of the "Dwayne Gray" wanted by the MDOC, or that they conducted a reasonable inquiry into the apparent discrepancy between the photograph and the appearance of the real Gray without uncovering any reason to believe that the Gray in custody was not the man wanted in Michigan-the trier of fact could find that the failure by Fuerst and Ussery to ascertain that they were holding the wrong person was unreasonable and thus violated Gray's Fourth Amendment and due-process

---

[2] On appeal, Gray for the first time challenges the validity of this warrant. We decline to consider this issue, as it was not raised below.

[3] With some understatement, the magistrate judge found that "[m]ost of the information [provided with the Basic Information Sheet] matched Plaintiff exactly, although the photograph did not." The appellate record contains both the photograph of Shaw provided with the Basic Information Sheet and the booking photograph of Gray taken at the Cuyahoga County Jail; even in their blurred, photocopied state, the two photographs do not appear to be the same person.

rights. On remand, therefore, the principal question for the trier of fact will be whether Fuerst and/or *Ussery used the degree of care a reasonable officer in their position* would have used to ascertain whether the Dwayne Gray they had in custody was the person wanted by the Michigan authorities on the outstanding parole-violation warrant. This question will require resolution whether the defendants proceed on the merits, or whether they reassert the defense of qualified immunity. *Cf. Jackson v. Hoylman*, 933 F.2d 401, 403 (6th Cir. 1991) (affirming district court's denial of officers' summary judgment motion and recognizing that, both for qualified-immunity and merits purposes, reasonableness issue is to be decided by jury using "objective reasonableness" standard).[4]

B

[3] Unlike Fuerst and Ussery, defendant Jevitch never saw the photograph of Shaw posing as Gray. Moreover, because he worked in a Michigan State Police office rather than at the Southern Michigan State Prison, he had never seen either Shaw or Gray. Jevitch's sole involvement in this matter is that, as a state police fingerprint technician, he responded to Ussery's request for a copy of Gray's fingerprint card. Jevitch simply did his job, providing the fingerprint card from the file matching the identification information provided by Ussery. Jevitch did not participate (and was not asked to participate) in any investigation of Gray's true identity beyond simply providing the fingerprint card. Accordingly, Gray's claims against Jevitch were properly dismissed by the district court.

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[4] Fuerst and Ussery argue on appeal that they could not have acted differently even if they had known Gray was the wrong man, because they were not authorized to deviate from the Ohio statutory procedure for extradition. Under that procedure, a person wanted in another state that has requested extradition must be incarcerated for not more than 30 days pending extradition, but only if "...it appears that the person held...is the person charged with having committed the crime alleged[.]" Ohio Revised Code 2963.13. Gray's case, of course, is premised on the allegation that he did *not* "appear [to be] the person charged with having committed the crime alleged"; Gray alleges that Fuerst and Ussery, as Cuyahoga County sheriff's deputies in possession of a photograph showing Gray not to be the wanted man, were obligated to investigate the case of mistaken identity more thoroughly than they did. While a jury ultimately may side with Fuerst and Ussery, finding that the apparent fingerprint match or other factors made it reasonable for them to believe Gray was the man wanted by the MDOC despite the photograph and physical description, the defendants' argument on appeal provides no reason to deprive the jury of their fact-finding role.

IV

For the foregoing reasons, the judgment of the district court is REVERSED in part. AFFIRMED in part, and REMANDED for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DWAYNE GRAY,

Plaintiff,

vs.

CUYAHOGA SHERIFF'S DEPARTMENT, et al.,

Defendants.

Case No.

95-CV-76265-DT

JUDGMENT

In accordance with the Memorandum Opinion and Order entered this date,

IT IS ORDERED AND ADJUDGED that the motions for summary judgment of defendants Fuerst, Ussery and Javtich are granted, and this action is dismissed.

Dated at Detroit, Michigan, February 3, 1997.

JOHN P. MAYER
CLERK OF THE COURT

By /S/
Deputy Clerk

Approved:
/S/ BERNARD A. FRIEDMAN
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DWAYNE GRAY,

Plaintiff,

vs.

CUYAHOGA SHERIFF'S DEPARTMENT, et al.,

Defendants.

Case No.

95-CV-76265-DT

/

MEMORANDUM OPINION AND ORDER

This matter is before the court on Magistrate Judge Thomas A. Carlson's Report and Recommendation dated January 16, 1997. The plaintiff has filed timely objections to this Report and Recommendation, wherein he takes exception to some of the factual information contained in the Magistrate Judge's Report and Recommendation, especially as it relates to the identity of the plaintiff. He also takes exception to the substantive due process and fourth amendment portions of the Report and Recommendations as it relates to reasonableness of the conduct.

This court has had an opportunity to review this matter fully and believes that the Magistrate Judge's analysis is well founded in the law and the undisputed facts and that he has reached the proper conclusion for the correct reasons. Accordingly,

IS HEREBY ORDERED that the Report and Recommendation of Magistrate Judge Thomas A. Carlson dated January 16, 1997, is accepted and adopted.

IT IS FURTHER ORDERED that the motions for summary judgment of defendants Fuerst, Ussery and Javtich are hereby granted, and the complaint dismissed.

/S/ BERNARD A. FRIEDMAN
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: February 3, 1997
Detroit, Michigan

Copies sent this date to:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DWAYNE GRAY,

Plaintiff,

vs.

CUYAHOGA SHERIFF'S DEPARTMENT, CUYAHOGA COUNTY, SHERIFF McFAUL, ROBERT PACE, OFFICER FUERST, CITY OF GARFIELD HEIGHTS, GARFIELD HEIGHTS POLICE DEPARTMENT, GERRY HOFBAUER, SERGEANT DILLY, and THOMAS MURPHY,

Defendants.
_____/

CIVIL ACTION

NO. 95-CV-76265-DT

HONORABLE
BERNARD A. FRIEDMAN
UNITED STATES
DISTRICT JUDGE

DWAYNE GRAY,

Plaintiff,

vs.

DETECTIVE JAMES FUERST, DEPUTY RANDY USSERY, JOHN RUBITSCHUM, DUSAN JEVTICH, THE MICHIGAN DEPARTMENT OF PAROLE, and THE MICHIGAN STATE POLICE,

Defendants.
_____/

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. FACTS AND PROCEEDINGS

Plaintiff Dwayne Gray was stopped by officers of the Garfield Heights Police Department, outside of Cleveland, Ohio, on September 24, 1993, and given a ticket for driving without a license. He was released, appeared as ordered in court on October 19, 1993, and was sentenced to five days in jail. That same day, after Plaintiff had been taken to the North Royalton Jail, the Garfield Heights Police Department learned that there was an outstanding Michigan Department of Corrections (MDOC) parole violation warrant for a Dwayne Gray and was informed by the Michigan authorities that they requested extradition of the prisoner.

The next day, October 20, 1993, the Municipal Court Judge was informed of the Michigan warrant and extradition request. He suspended the balance of the five day sentence and Plaintiff was taken to the Cuyahoga County Jail for the Sheriff's Department to handle the extradition proceedings. Plaintiff was protesting that he was not the person wanted and on October 20th the MDOC sent copies of the warrant and their Basic Information Sheet to Defendant Fuerst at the Sheriff's Department. That Sheet included the wanted prisoner's name, date of birth, FBI, State Identification and Social Security numbers, as well as race, sex, height, weight and other physical characteristics, and a copy of a photograph. Most of the information matched Plaintiff exactly, although the photograph

did not.

On October 26, 1993, Defendant Ussery, a Cuyahoga County Deputy Sheriff who had been advised by the Michigan Department of Corrections to contact the Michigan State Police (MSP) to obtain the subject's fingerprints, sent a request for those prints, providing the name, State Identification number, FBI number, date of birth and Social Security number he had been given by the MDOC. Defendant Jevtich of the State Police processed the request and faxed a set of fingerprints from the file jacket he had for the identified person. Subsequently, he mailed a hard copy of the prints to the Sheriff's Department, and they matched those of Plaintiff who was in custody.

Meanwhile, counsel was appointed to represent Plaintiff in the extradition proceedings. Although he continued to protest that he was not the wanted person, after the Michigan fingerprints were found to match his own, he was advised that it would probably take less time to clear up the problem if he went back to Michigan. Accordingly, he signed a Waiver of Extradition on November 22, 1993.

Plaintiff arrived at the State Prison of Southern Michigan in Jackson, Michigan on Wednesday, November 24, 1993, the day before Thanksgiving. The administrative offices were closed over the holiday weekend, but when Plaintiff's fingerprints were found not to match those

on file at the prison of the wanted parole violator, he was released on Monday, November 29, 1993.

The origin of the mix-up begins in February 1987 when Plaintiff was arrested by officers of the Detroit Police Department for receiving and concealing stolen property. His fingerprints were taken and sent to the State Police central file in Lansing. There he was assigned a State Identification number and a file, with his identifying information, was opened. Plaintiff received probation for the offense and was discharged therefrom two years later. In October 1989 an individual by the name of Earl Shaw, an old acquaintance of Plaintiff from his Detroit neighborhood, was arrested in Muskegon, Michigan for a drug offense. Mr. Shaw used Plaintiff's identifying information and was convicted under the name of Dwayne Gray. After serving time in the custody of the Michigan Department of Corrections, Shaw was paroled in February 1992. When he failed to report as directed, a parole violation warrant for his arrest was issued on October 7, 1992, in the name of Dwayne Gray.

It was this warrant upon which Plaintiff was detained and extradited. All of the data on the Basic Information Sheet (except the photograph) provided by the MDOC to Cuyahoga County matched Plaintiff because of

the rousse by Shaw. When that information was sent to Jevitch at the State Police by Fuerst and Ussery, it corresponded to the file that had originally been opened on Plaintiff in 1987 and Jevitch, accordingly, sent a copy of the fingerprints (of Plaintiff) which the file contained, to the Sheriff's Department in Ohio.

On February 3, 1995 Plaintiff filed suit in this Court against the Cuyahoga County Defendants, the Garfield Heights Defendants, and Jackson State Prison Defendants (CA No. 95-60019). On October 12, 1995 he filed suit against Fuerst, Ussery, Michigan Parole Defendants, and Michigan State Police Defendants (including Jevitch) (CA No. 95-75209).[1] In his two Complaints, Plaintiff asserted various violations of his federal constitutional rights, and pendent state law claims, arising out of his wrongful detention and extradition to Michigan.

The Garfield Heights Defendants were voluntarily dismissed by Plaintiff on February 1, 1996. Motions to Dismiss or for Summary Judgment were filed by the Michigan State Police Defendants on June 3, 1996, by the Cuyahoga County Defendants on June 7, 1996, and by the Michigan Parole Board and State Prison Defendants on June 11, 1996.

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[1]The first action (95-60019) was assigned to Judge LaPlata. The second (95-75209) was assigned to Judge Friedman, reassigned to Judge LaPlaza as CA No. 95-60243, then consolidated with 95-60019 and administratively dismissed. After Judge LaPlata's retirement, 95-60019 (encompassing both originally filed suits) was reassigned back to Judge Friedman, as the current 95-76265.

The dispositive motions were referred to the undersigned and oral arguments were heard on September 24, 1996. Plaintiff has agreed to dismiss the Michigan prison and parole Defendants and has limited his claims to those against Defendants Fuerst, Ussery and Jevitch. The gravamen of Plaintiff's Complaint against the remaining Defendants is that, having been apprised of his protestations of innocence, they should have inquired further and obtained additional fingerprints from the Michigan Department of Corrections which would have cleared him; Defendants contend that, under the same facts, their actions were reasonable and did not violate any of Plaintiff's state or federal rights.

II. THE FEDERAL CLAIMS

42 U.S.C. section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding.

However,

> It is for violations of [federal] . . . constitutional and statutory rights that 42 U.S.C. §1983 authorized redress; that section is not itself a source of substantive rights, but a method of vindicating federal rights elsewhere

> conferred by those parts of the United States Constitution and federal statutes that it describes.

Baker v. McCollan, 443 U.S. 137, 144, fn. 3 (1979).

The starting point under section 1983, then, must be to ascertain exactly which constitutional guarantees Defendants are alleged to have violated. Within that context, Plaintiff's federal claims appear to be based upon the Fourth Amendment and procedural and substantive due process claims under the Fifth and Fourteenth Amendments.

PROCEDURAL DUE PROCESS

> A procedural due process limitation, unlike its substantive counterpart, does not require that the government refrain from making a substantive choice to infringe upon a person's life, liberty, or property interest. It simply requires that the government provide "due process" before making such a decision. The goal is to minimize the risk of substantial error, to assure fairness in the decision-making process, and to assure that the individual affected has a participating role in the process. The touchstone of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard "in a meaningful manner."

Howard v. Grinage, 82 F.3d 1343, 1349 (6th Cir. 1996).

In the instant case, counsel was appointed to represent Plaintiff as soon as extradition proceedings were commenced. He had the opportunity for a full hearing as to whether he was the Dwayne Gray referred to in the Michigan parole violation warrant, but elected to waive that hearing and

return to Michigan to clear the matter up.[2] He thus had a meaningful opportunity to be heard and there appear to be no procedural due process violations in his treatment.

SUBSTANTIVE DUE PROCESS AND THE FOURTH AMENDMENT

There are two types of substantive due process. One is based upon specific guarantees in the federal Constitution or statutes, the other based upon nonmentioned fundamental rights or upon conduct which is deemed otherwise unacceptable in a civilized society.

> Substantive due process claims are of two types. The first type includes claims asserting denial of a right, privilege, or immunity secured by the Constitution or by federal statute other than procedural claims under the Fourteenth Amendment . . . . The other type of claim is directed at official acts which may not occur regardless of the procedural safeguards accompanying them. The test for substantive due process claims of this type is whether the conduct complained of "shocks the conscience" of the court.

Mertik v. Blalock, 983 F.2d 1353, 1367-68 (6th Cir. 1993).

> Substantive due process, on the other hand, serves the goal of preventing "governmental power from being used for purposes of oppression," regardless of the fairness of the procedures used . . . it can serve as a check on . . . official misconduct which infringes on a "fundamental right," or as a limitation on official misconduct which, although not

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[2]While Plaintiff testified at his deposition that he was advised it would speed things up to return to Michigan, instead of contesting identity in Ohio, he could not recall exactly who gave him that advice. (Pltf. Dep. P. 41-42, 47-48).

> infringing on a fundamental right, is so literally "conscience shocking," hence oppressive, as to rise to the level of a substantive due process violation.

Howard v. Grinage, supra, 82 F.3d at p. 1349.

However one may characterize the failure of Deputies Fuerst and Ussery, and of Officer Jevitch, to obtain a second set of fingerprints from the Michigan Department of Corrections, "it surely cannot be said to shock the conscience of the Court," and no claim for nonspecific substantive due process has been stated.

With respect to more specific constitutional guarantees, the Court in Baker v. McCollan, 443 U.S. 137 (1979), cited earlier, addressed a situation similar to the case at hand. In Baker an arrest warrant had been issued in Plaintiff's name after Plaintiff's brother had used Plaintiff's name and driver's license when he was arrested before. In finding no constitutional violation, the Court stated:

> Absent an attack on the validity of the warrant under which he was arrested, respondent's complaint is simply that despite his protestations of mistaken identify, he was detained in the Potter County Jail from December 30, when Potter County deputies retrieved him from Dallas, until January 2, when the validity of his protests was ascertained. Whatever claims this situation might give rise to under state tort law, we think it gives rise to no claim under the United States Constitution.

443 U.S. at pp. 143-144.

We do not think a sheriff executing an arrest warrant is

> required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error free investigation.

443 U.S. at pp. 145-146.

At the same time, the Court indicated that a significantly longer confinement could lead to a different result.

> Obviously, one in [Plaintiff's] position could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment.

443 U.S. at p. 144

> We may even assume, arguendo, that, depending on what procedures the state affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of "liberty without due process of law."

443 U.S. at p. 145

Baker did not discuss the standard to be applied, or even the particular kind of "due process" involved, in cases of extended confinement. Subsequently, in Graham v. Connor, 490 U.S. 386 (1989), however, the Court did hold that:

> [A]ll claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other "seizure" of a free citizen

> should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach.

490 U.S. at p. 395.[3]

The Court also observed:

> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

490 U.S. at p. 397.

The most applicable constitutional right involved in Plaintiff's claim for false or wrongful imprisonment here would seem to be the Fourth Amendment's prohibition against "unreasonable seizures" and the undersigned is persuaded that, particularly since Graham, the "reasonableness" standard (under the Fourth Amendment), and not the (nonspecific) "shocking to the conscience," or some other,[4] test should be applied. See Braley v. City of Pontiac, 906 F.2d 220, 225-226 (6th Cir.

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[3]The Court specifically did not decide if the Fourth Amendment would apply to claims of excessive force against pretrial detainees. 490 U.S. at p. 395, n. 10.

[4]Such as "gross negligence," the test for a procedural due process claim in the Sixth Circuit. Howard v. Grinage, supra, 82 F.3d at p. 1350. Compare Duckett v. Cedar Park, 950f.2d 272,279 (5th Cir. 1992) which held that officers must release an arrestee if they ascertain beyond a reasonable doubt that the reasons for the initial arrest are invalid or that the warrant has been withdrawn.

1990); Cassady v. Tackett, 938 F.2d 693, 698 (6th Cir. 1991); Williams v. County of Sullivan, 157 F.R.D. 6, 8-9 (S.D.N.Y. 1994).

With the reasonableness test in mind, then, we turn to the information in the possession of the remaining Defendants. The name, date of birth, social security number, race, sex, eyes, hair, height, weight and fingerprints, obtained by Detective Fuerst and Deputy Ussery from the parole violation warrant, the Basic Information Sheet from the Michigan Department of Corrections, and the prints from the Michigan State Police, all matched Plaintiff identically. The only differences were the photograph and some variations in physical characteristics (the Basic Information Sheet indicated a medium complexion, thin build and a scar on the neck; the County Booking Sheet indicated a dark complexion, medium build, and scars on the right arm and over the right eye). The deputies had been told by the Michigan Department of Corrections to obtain fingerprints from the Michigan State Police (Ussery Dept. p. 21), and were aware that Plaintiff had counsel and could have an extradition (Identity) hearing. "Under all of these circumstances, the undersigned is persuaded that it was not unreasonable for Defendants Fuerst and Ussery to not have obtained a second set of fingerprints from the Michigan Department of Corrections,

and that no claim under the Fourth Amendment has been made."[5]

Defendant Jevtich of the Michigan State Police was requested by Cuyahoga County to provide fingerprints of a Dwayne Gray, with a specific date of birth, social security number, State Identification number and FBI number. He located a file, which matched all of the transmitted data and sent the fingerprints contained therein. Although there is no question that the requests had advised him that the person in custody in Ohio denied being the subject wanted for parole violation, when he did send the prints, Deputy Ussery responded to him that "based on what I see the correct person is in our jail" (Exhibit 4, Def. MSP Motion for Summary Judgment). Under these circumstances, the undersigned also believes Defendant Jevtich was under no constitutional obligation to make further inquiry on his own of the Department of Corrections to obtain a second set of fingerprints. His actions or inaction were reasonable and did not violate the Fourth Amendment.

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[5]Compare Buenrostro v. Collazo, 777 F.Supp. 128 (D.P.R. 1991), affd. 973 F.2d 39 (1st Cir. 1992), where Plaintiff was arrested without a warrant, protested he was not the wanted person although he had the same name and birth date as the suspect, but was held for 31 days before the police obtained fingerprints and a photograph which cleared him.

III. THE STATE CLAIMS

Michigan recognizes the common law tort of false imprisonment and the test appears to be, as for false arrest, whether there was probable cause for the prisoner's continued detention. See Gooch v. Wachowiak, 352 Mich. 347, 353 (1958). The Michigan courts have also recognized that, while there is no separate action for "negligent investigation," Flones v. Dalman, 199 Mich. App. 396, 402-403 (1993):

> A police officer is not shielded from liability by a warrant where, because of the officer's failure to investigate or disclose exculpatory information, probable cause for the issuance of the warrant may have been lacking.

Flones, supra, 199 Mich. App. at p. 404.

The real question, however, as to the viability of Plaintiff's state law claim, turns on the applicability of the state immunity statute. MCL 691.1407(2) provides:

> [E]ach officer and employee of a governmental agency . . . shall be immune from tort liability for injuries to persons or damages to property caused by the officer . . . while in the course of employment . . . if all of the following are met:
>
> (a)The officer . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b)The governmental agency is engaged in the exercise or discharge of a governmental function.

> (c)The officer's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

The operation of a police department is clearly a governmental function and the Defendants here, inquiring into the identity of an arrested suspect, were clearly acting within the scope of their authority. See Ross v. Consumers Power Co., 420 Mich. 567, 661 (1984).[6]

For the same reasons that led the undersigned to conclude that Defendants' conduct was not unreasonable for Fourth Amendment purposes, the undersigned also finds that Defendants' failure to affirmatively obtain a second set of fingerprints from the Michigan Department of Corrections did not, as a matter of law, exhibit gross negligence or a "substantial lack of concern whether an injury result[ed]."[7] Defendants are entitled to immunity and the state law claims should be

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[6]The statute was relied upon in Bell v. Fox, 206 Mich. App. 522 (1994), a case of mistaken arrest relied upon by Defendants, but the Court there specifically did not address the issue of the three day delay before release. 206 Mich. App. at p. 527. In Flones, supra, relied upon by Plaintiff, the claim arose before the current, amended, statute.

[7]Nor does their conduct appear to be "outrageous," or "extreme," or "beyond all possible bounds of decency," which is independently required to state a claim for intentional infliction of emotional distress. Roberts v. Auto Owners, 422 Mich. 594, 602-603 (1985); Taube v. Howe, 179 Mich. App. 91, 107 (1989).

dismissed as well.[8]

For all of the foregoing reasons, it is accordingly recommended that the Motions for Summary Judgment of Defendants Fuerst, Ussery and Jevtich be granted and the instant Complaint(s) dismissed. The parties are advised that any objections to this Report and Recommendation must be filed with the Court within ten (10) days after they are served with a copy, or further appeal from Judge Friedman's acceptance thereof is waived.

/S/ THOMAS A. CARLSON
THOMAS A. CARLSON
UNITED STATES MAGISTRATE JUDGE

DATED: 1/16/97

cc: Honorable Bernard A. Friedman
Thomas H. Bannigan
Douglas Mullkoff
Pamela J. Stevenson
Marilyn Cassidy

[8]It is, frankly, not altogether clear how the conduct or inaction of the Cuyahoga County Defendants could violate Michigan law, but the issue has not been raised by the parties. It does seem only fair that if they, as peace officers, may be liable under Michigan law, they should be entitled to the Michigan immunity protection. Furthermore, Ohio Revised Code 2744.02(b)(4) accords political subdivisions immunity from liability for negligence which occurs in jails or other detention facilities. This arguable would also protect the Deputy Sheriffs.

U.S. CONST. AMEND. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or Property, without due Process of law; nor deny to any person within its jurisdiction the equal Protection of the laws.

28 USC §1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

42 USC §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ohio Revised Code §2963.13

If from the examination before the judge or magistrate it appears that the person held under section 2963.11 or 2963.12 of the Revised Code is the person charged with having committed the crime alleged and that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time, not to exceed thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused furnishes bail or until he is legally discharged.